

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STUDIO 010, INC. d/b/a EQUADOSE,

Plaintiff,

v.

DIGITAL CASHFLOW LLC d/b/a HEAR
CLEARLY; and CHRISTOPHER
ACKERMAN, an individual,

Defendants.

NO. 2:20-cv-01018-RAJ

**DEFENDANTS' MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. 12(b)(1)
AND 12(b)(6)**

**NOTED ON MOTION CALENDAR:
September 11, 2020**

ORAL ARGUMENT REQUESTED

Defendants Digital Cashflow, LLC d/b/a Hear Clearly's ("Hear Clearly") and Christopher Ackerman (collectively, "Defendants") move to dismiss Plaintiff Studio 101, Inc. d/b/a Equadose's ("Equadose") Complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, and to dismiss the claims against Defendant Christopher Ackerman pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim against him individually.

I. INTRODUCTION

Plaintiff's Complaint does not present a plausible claim of patent noninfringement based on the "current design" of Plaintiff's ear washing product. Not only does it fail to identify a single element of any claim that is absent from its product, it fails to even identify which of the

DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED. R.
CIV. P. 12(b)(1) AND 12(b)(6) - 1
(2:20-cv-01018-RAJ)

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1 19 claims of the '191 patent, which are directed to various methods and apparatuses, are at issue.
2 Not a single claim of the '191 patent is called out in the Complaint.

3 Plaintiff's invalidity (and related contentions) based on its "current design," or any other
4 design, contain a similar flaw. The Complaint makes no showing that each element of any claim
5 of the '191 patent is present in Plaintiff's product, as it existed on or before June 11, 2018, which
6 would be required to show invalidity of that claim or to satisfy the "but for" requirement of
7 unenforceability. No specific claim is called out as invalid. If Plaintiff made a plausible showing
8 that claim elements are absent from its products for noninfringement, then there would not be
9 any plausible claim of invalidity of relating to that same claim. In other words, by eschewing an
10 element-by-element comparison of the accused device to the limitations of the claims, the
11 Complaint fails to place Defendants on notice of whether the *actual* dispute is one of
12 infringement or of invalidity or place Defendants on notice of the specific claims and claim
13 elements Plaintiff wishes to dispute.

14 Moreover, if the dispute involves validity based on the "current design," then the
15 Complaint has another flaw—it does not contain a plausible contention that the "current design"
16 predates the '191 patent. As pleaded, the critical date for the Complaint's contentions is June
17 12, 2018, one year prior to the June 12, 2019, filing date for the '191 patent. The Complaint's
18 pleading of "Summer of 2018" is not a plausible allegation to demonstrate Plaintiff's activities
19 concerning its "current design" prior to June 12, 2018, to support invalidity. Nor is there a
20 plausible allegation for Defendants' knowledge of Plaintiff's activities prior to June 12, 2018,
21 necessary to support Plaintiff's contentions remaining Counts.

22 Given these deficiencies, Plaintiff's Counts I-VIII, which are pleaded in a "shotgun"
23 fashion, fail. Each of Plaintiff's invalidity and improper conduct contentions rely on its "current
24 product" theories and fail to state a claim on patent Counts I and II, and the shotgun pleading of
25 Plaintiff's other state law contentions (Claims III-VI) and unfair competition (Claim VII) also

1 fail. Regarding Claim VIII, Plaintiff's merely sets forth a number of legal conclusions again
 2 without tying those conclusions to specific alleged facts. Plaintiff's Complaint should be
 3 dismissed.

4 Additionally, Plaintiff has not established that the corporate veil of Defendant Ackerman
 5 should be pierced to make him, rather than his corporation, a proper defendant for each Count.

6 **II. OVERVIEW**

7 The Complaint in the instant case, filed on June 30, 2020, includes eight enumerated
 8 causes of action: 1) Declaratory Judgment of Invalidity of the '191 Patent; 2) Declaratory
 9 Judgment of Non-Infringement of the '191 Patent; 3) Tortious Interference with Existing
 10 Contract; 4) Commercial Disparagement; 5) Deceit and Negligent Misrepresentation; 6) Unfair
 11 Competition (RCW 19.86.020 *et seq*); 7) Unfair Competition Under the Lanham Act, Section
 12 43(A); and 8) Infringement of Registered US Trademark.

13 Fed. R. Civ. P. 8 and the *Iqbal/Twombly* plausibility pleading requirement set forth by
 14 the Supreme Court of the United States in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544,
 15 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937,
 16 173 L.Ed.2d 868 (2009) requires a plaintiff to allege "enough facts to state a claim of relief that
 17 is plausible on its face." *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955.

18 Accordingly, Equadose must allege sufficient facts to show that each element is
 19 plausible, including each element of the state law causes of action, i.e. Tortious Interference with
 20 Existing Contract, Commercial Disparagement, Deceit and Negligent Misrepresentation, and
 21 Unfair Competition (RCW 19.86.020). In particular, the state law causes of action must each be
 22 include elements Washington state statutes but pleaded to meet *Iqbal* standards as Equadose has
 23 elected to pursue these state claims in a federal forum, be pleaded in a manner that satisfies the
 24 *Iqbal/Twombly* standard for pleadings for claims entrusted to federal jurisdiction. Moreover,
 25

Equadose must show a plausible basis for establishing that the state law claims are not preempted by federal patent law.

Central to Equadose's patent-based causes of action, is the assertion that the '191 Patent is invalid, and that the Equadose device does not infringe of the '191 Patent. Equadose must first demonstrate that the two declaratory judgment matters are appropriately before the Court based upon a real case or controversy, in order for the Court to then extend its limited jurisdiction to hear the state law claims in this forum. As shown below, Equadose fails to meet the *Iqbal/Twombly* standard for factual pleading for the two declaratory judgment counts such that the Court cannot entertain the remaining claims. All of the patent-based claims must, then, be dismissed.

The claims against Defendant Christopher Ackerman individually must also be dismissed because Equadose has not alleged sufficient facts to plausibly show it can pierce Defendant Digital Cashflow, LLC's corporate veil such that the claims asserted against Defendant Christopher Ackerman in his individual capacity are accurate.

III. AUTHORITY

A Rule 12(b)(6) motion tests the legal sufficiency of a claim. A claim may be dismissed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir.1996). "In order to satisfy the pleading standards set forth in Rule 8 of the Federal Rules of Civil Procedure, a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face" *Id. at* *13 (*citing Iqbal*, 556 U.S. at 678) (*citing Twombly*, 550 U.S. at 570). "Threadbare recitals of the elements of a cause of action, supported by merely conclusory statements, do not suffice." *Id.* In ruling on a motion to dismiss pursuant to Rule 12(b)(6), courts must accept all factual allegations as true and draw all reasonable inferences in plaintiff's favor. *Id. at* *12. "However,

1 this requirement does not apply to legal conclusions, bare assertions or conclusory allegations.”
 2 *Id.* (citing *Iqbal*, 556 U.S. at 678, 681.) (citing *Twombly*, 550 U.S. at 555.) “A complaint that
 3 ‘tenders naked assertions devoid of further factual enhancements’” will not survive a motion to
 4 dismiss under Rule 12(b)(6). *Id.* at 14 (citing *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S.
 5 at 557 (internal quotation marks omitted) (brackets omitted))). “Non-conclusory ‘factual
 6 content,’ and reasonable inferences from that content, must be plausibly suggestive of a claim
 7 entitling the plaintiff to relief.” *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009)
 8 (citation omitted). Either the “lack of a cognizable legal theory” or the “absence of sufficient
 9 facts alleged under a cognizable legal theory” can result in dismissal. *Balistreri v. Pacifica Police*
 10 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

11 Defendant Digital Cashflow, LLC is New Jersey limited liability company of which
 12 Defendant Christopher Ackerman is the owner. “Under New Jersey law, a plaintiff must show
 13 the following to pierce the corporate veil: ‘(1) one corporation is organized and operated as to
 14 make it a mere instrumentality of another corporation, and (2) the dominant corporation is using
 15 the subservient corporation to perpetrate fraud, to accomplish injustice, or to circumvent the
 16 law.’” *Creditors Relief LLC v. United Debt Settlement LLC*, 2019 WL 7288978, at *4 (D.N.J.,
 17 2019) (citing *Bd. of Trustees of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d
 18 164, 171 (3d Cir. 2002)). “The relevant factors in determining whether the first element is
 19 satisfied include (1) gross undercapitalization; (2) failure to observe corporate formalities; (3)
 20 non-payment of dividends; (4) the insolvency of the debtor corporation; (5) non-functioning of
 21 other officers or directors; (6) absence of corporate records; and (7) the fact that the corporation
 22 is merely a facade for the operations of the dominant stockholder or stockholders. *Id.* (citing
 23 *Teamsters*, 296 F.3d at 172).

IV. ARGUMENT

As an initial matter, it should be recognized that each of the Counts, termed “Claims” by Plaintiff, in the Complaint merely recants legal conclusions concerning the legal elements of the count, without clearly linking those allegations to the recitations set forth earlier in the Complaint. Thus, they reflect a disfavored “shotgun pleading” format. *See Smart Modular Tech., Inc. v. Netlist, Inc.*, No. 2:12-cv-02319, Order at 10 (E.D. Cal. July 13, 2017) (“A pleading is considered a shotgun pleading when a party pleads multiple claims and does not identify which specific facts are allocated to which claim.”) (citing *In re Mortgages Ltd.*, No. 2013 WL 1336830, at *12 (Bankr. D. Ariz. March 29, 2013); *Magulta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001)).

A. Count II of the Complaint should be dismissed for failure to state a claim upon which relief can be granted because the Complaint fails to allege facts from which one could plausibly infer that Equadose does not infringe the ‘191 patent.

Defendants will first address Count II of the Complaint before turning to the remainder of the Counts. The *Iqbal/Twombly* standard applies to Count II. To survive a motion to dismiss, Equadose’s Complaint must allege enough facts to state a claim for a declaration of noninfringement that is plausible on its face. *Twombly*, 550 U.S. at 570. Equadose must plead sufficient facts that show something “more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 129 S. Ct. at 1949. It must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 1949. The “[f]actual allegations must be enough to raise a right to relief above the speculative level[.]” *Twombly*, 550 U.S. at 555. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 129 S. Ct. at 1949.

Here, Equadose’s Complaint does not allege sufficient facts to state a claim for relief in the form of a declaratory judgment of noninfringement that is plausible on its face because the Complaint does not allege facts showing that the “current design” Equadose product sold in

1 “Summer of 2018” actually has any product features that distinguish it from the claim elements
2 of the ‘191 Patent such that ‘191 patent does not read on the Equadose product features.

3 “In the patent context, it is not enough to “[m]erely nam[e] a product and provid[e] a
4 conclusory statement that it infringes a patent.” *Intellicheck Mobilisa, Inc. v. Honeywell*
5 *International Inc.*, 2017 WL 5634131, at *6 (W.D. Wash., 2017) (citing *Incom Corp. v. Walt*
6 *Disney Co.*, 2016 WL 4942032, at *3 (C.D. Cal.). “Sufficient allegations would include, at a
7 minimum, a brief description of what the patent at issue does, and an allegation that certain
8 named and specifically identified products or product components also do what the patent does,
9 thereby raising a plausible claim that the named products are infringing” *Id.* (citing *Bender v. LG*
10 *Elecs. U.S.A., Inc.*, 2010 WL 889541, at *6 (N.D. Cal.). “Such allegations would ‘provide
11 enough specificity for the defendant to formulate a response’ and ‘permit the [c]ourt to ‘draw the
12 reasonable inference that the defendant is liable for the misconduct alleged.’” *Id.* (quoting *Iqbal*,
13 556 U.S. at 678).

14 While this is a declaratory judgment of noninfringement rather than a claim of patent
15 infringement, the same standard applies. *See Minka Lighting, Inc. v. Vaxcel Int’l Co.*, No. 5:18-
16 cv-00947-GW-SHK, Dkt. 38, Order at 2-4 (C.D. Cal. Oct. 18, 2018) (finding declaratory
17 judgment plaintiff “Minka does not identify any exemplary limitations from the claims of the
18 ‘481 Patent, let alone explain that those limitations are not met by its one or more products at
19 issue. The Court agrees ... that the Declaratory Judgment Complaint’s and the counterclaim’s
20 boilerplate assertion that Minka does not infringe the claims of the ‘481 Patent is insufficient to
21 meet Rule 8’s pleading requirements.”).¹ Here, the Complaint does not recite any ‘191 Patent
22 claim language or identify any claim at all, rendering it unclear whether all claims of the ‘191
23 patent, or a subset of the claims, are at issue. While the “current version” of Equadose HEAR
24 product is identified, it does not set forth facts showing that “those limitations are not met” by
25

¹ See Declaration of Mark Lawrence Lorbiecki (“Lorbiecki Decl.”), Ex. A.

its product to establish noninfringement. The Complaint does not map any product features to claim limitations. It does not, therefore, state a claim for noninfringement. Count II should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

B. Count I of the Complaint should be dismissed for failure to state a claim upon which relief can be granted because the Complaint fails to allege facts from which one could plausibly infer that the Hear Clearly patent is invalid.

Similarly, Count I, seeking declarations that the '191 patent is invalid, must be dismissed because it is not adequately pleaded. Count I seeks a declaration that all claims of the '191 patent are invalid but no claim of the '191 patent is called-out in the Complaint. Compl. ¶¶ 2, 11, 33, 40, 41, 43, 61, & Prayer for Relief ¶ 3. The count recites that the '191 patent is invalid under "at least one of 35 U.S.C. §§ 101, 102, 103 and 112" and further recites merely the boilerplate legal assertion that the claims of the '191 are invalid without any discussion of how the elements of the alleged prior art product reads on any claim limitations of the '191 patent.

Invalidity allegations without specific references to claimed elements existing in the prior art are insufficient to withstand a motion to dismiss. *See J & K IP Assets, LLC v. Armaspec, Inc.*, No. 3:17-cv-07308-WHO, 2018 WL 3428757, at *2 (N.D. Cal. July 16, 2018); *PageMelding, Inc. v. ESPN, Inc.*, No. C 11-06263 WHA, 2012 WL 3877686, at *3 (N.D. Cal. Sept. 6, 2012); *Xilinx, Inc. v. Invention Inv. Fund I LP*, No. C 11-0671 SI, 2011 WL 3206686, at *6–7 (N.D. Cal. July 27, 2011).

In these cases, the declaratory-judgment plaintiffs simply recited various sections of the patent statutes and then asserted invalidity as a conclusion, without more. In no case did the plaintiff what elements of the claims anticipate those of the issued patent. *Cf. J & K IP Assets*, 2018 WL 3428757, at *2 (noting that "[counterclaim plaintiff] asserts counterclaims for declaratory judgment that the '424 patent is invalid as anticipated under 35 U.S.C. § 102 and obvious under 35 U.S.C. § 103, but it fails to include any allegations identifying prior art or explaining how that art anticipates or renders obvious any particular claims of the '424 patent");

1 *PageMelding*, 2012 WL 3877686, at *3 (noting that counterclaim plaintiff alleged only that
 2 “[o]ne or more claims of the ’577 patent are invalid for failing to comply with one or more of
 3 the requirements of the Patent Laws of the United States, 35 U.S.C. §§ 100, et seq., including,
 4 but not limited to, §§ 101, 102, 103, and/or 112,” without more); *Xilinx*, 2011 WL 3206686, at
 5 *6 (noting that declaratory-judgment plaintiff “alleg[es] only that the patents fail ‘to comply with
 6 one or more of the requirements of the patent laws of the United States, including, without
 7 limitation, 35 U.S.C. §§ 101, 102, 103, and/or 112,’ ” without more).

8 There are no shortcuts to proving anticipation based on a prior art reference. Contrary to
 9 what Equadose has argued in paragraphs 1, 8, 21, 23, 25, which essentially ask the court to find
 10 all claims of the ’191 patent invalid simply because its product was accused of infringement
 11 instead of what it is necessary, an element-by-element of comparison of each claim to the alleged
 12 prior art reference. For example, *Zenith Electronics Corp v. PDI Communication Systems, Inc.*,
 13 522 F.3d 1348, 1363 (Fed. Cir. 2008) held that “anticipation cannot be proved by merely
 14 establishing that one ‘practices the prior art.’” The Court explained that “mere proof that the
 15 prior art is identical, in all material respects, to an allegedly infringing product cannot constitute
 16 clear and convincing evidence of invalidity,” *id.* at 24, and noted that anticipation requires a
 17 showing that each element of the claim at issue, properly construed, is found in a single prior art
 18 reference. Here, Equadose has made no such factual pleading.

19 Moreover, Equadose has not adequately pleaded that its “current design” predates the
 20 relevant date for the ’191 patent under 35 U.S.C. § 102(a)(1). The Complaint relies on 35 U.S.C.
 21 § 102(a)(1) (Complaint, ¶ 11) and contends that “current design [has been] on sale since Summer
 22 of 2018” (Complaint, ¶¶ 1, 10). The Complaint does not present any plausible contentions that
 23 the “1 year or less” exceptions set forth in 35 U.S.C. § 102(b)(1) are relevant. Thus, the critical
 24 date for the Complaint’s contentions is June 12, 2018, one year prior to the filing date for the
 25 ’191 patent. The Complaint, however, goes no further than reciting that its “current design” has

1 been “on sale since Summer of 2018.” Complaint, ¶ 1. “Summer of 2018” is not a plausible
 2 allegation to demonstrate Plaintiff’s activities concerning its “current design” prior to June 12,
 3 2018, to support invalidity, or to support a plausible allegation of Defendants’ knowledge of
 4 Plaintiff’s activities prior to June 12, 2018, to support Plaintiff’s other patent-based claims.

5 Thus, the boilerplate recitations of legal conclusions about sections 101, 102, 103, and
 6 112 of the Patent Act simply do not suffice to state a claim that the Court should declare that
 7 patent claims are invalid. *Comcast Cable Commc’ns, LLC v. OpenTV, Inc.*, 319 F.R.D. 269, 273
 8 (N.D. Cal. 2017) (under *Iqbal/Twombly*, the complaint must “set forth factual allegations . . .
 9 showing why the asserted patent is invalid”); *BesTop Inc. v. Webasto Thermo & Comfort N. Am.,*
 10 *Inc.*, No. 19-CV-10250, 2019 WL 2600954, at *3 (E.D. Mich. June 25, 2019) (“No one is asking
 11 defendants to ‘plead each and every legal theory of invalidity for each of five patents,’ but to
 12 plead sufficient facts in support of their claims, as the law requires.”). But, because the Complaint
 13 offers no factual allegations about invalidity that are focused on the language of a single claim,
 14 or set of claims, of the ’191 patent, or any element of those claims, it fails plausibly to allege that
 15 any claim of the ’191 patent is invalid. Count I should therefore be dismissed pursuant to Fed.
 16 R. Civ. P. 12(b)(6).

17 **C. Counts III-VII of the Complaint should be dismissed for failure to state a claim**
 18 **upon which relief can be granted because they depend on Equadose’s failed**
 19 **allegations of noninfringement and invalidity.**

20 “[A] patentee must be allowed to make its rights known to a potential infringer so that
 21 the latter can determine whether to cease its allegedly infringing activities, negotiate a license if
 22 one is offered, or decide to run the risk of liability and/or the imposition of an injunction.”
 23 *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 362 F.3d 1367, 1374-75 (Fed. Cir.
 24 2004) (quoting *Va. Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 869 (Fed. Cir. 1997)).

25 “Federal Circuit law governs whether federal patent law preempts a state law claim.”
Ultra-Precision Mfg., Ltd. v. Ford Motor Co., 411 F.3d 1369, 1376 (Fed. Cir. 2005). “A state

1 law claim is preempted if it ‘stands as an obstacle to the accomplishment and execution of the
 2 full purposes and objectives of Congress.’” *Id.* (citations omitted). As the Federal Circuit
 3 instructed:

4 [t]o determine whether these state law torts are in conflict with federal
 5 patent law and accordingly preempted, we assess a Defendant's allegedly
 6 tortious conduct. If a plaintiff bases its tort action on conduct that is
 7 protected or governed by federal patent law, then the plaintiff may not
 8 invoke the state law remedy, which must be preempted for conflict with
 9 federal patent law. Conversely, if the conduct is not so protected or
 10 governed, then the remedy is not preempted. This approach, which
 11 considers whether a state law tort, ‘as-applied,’ conflicts with federal
 12 patent law, is consistent with that employed by the Supreme Court in cases
 13 involving preemption of state unfair competition law.

14 *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1335 (Fed. Cir. 1998) (*overruled*
 15 *on other grounds by Midwest Ind. Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356, 1360-61 (Fed.
 16 Cir. 1999) (*en banc in part*)). A patent is presumed valid. 35 U.S. Code § 282.

17 Hear Clearly’s use of the ‘191 patent to prevent others from making, using, selling, or
 18 offering for sale is protected and/or governed by federal patent law. “[F]ederal patent law bars
 19 the imposition of liability for publicizing a patent in the marketplace unless the plaintiff can show
 20 that the patentholder acted in bad faith.” *Hunter Douglas*, 153 F.3d at 1336.

21 Because the Complaint fails to adequately plead its Counts of noninfringement or
 22 invalidity, Counts III-VII, which are dependent on improper claims of infringement and validity,
 23 fail. Specifically, federal patent law preempts any state law cause of action that would impose
 24 liability for a patent holder’s “good faith conduct” in asserting its patent rights. *See Globetrotter*
 25 *Software, Inc. v. Elan Computer Grp., Inc.*, 362 F.3d 1367, 1374–77 (Fed. Cir. 2004); *Zenith*
Elec. Corp. v. Exzec, Inc., 182 F.3d 1340, 1353–54 (Fed. Cir. 1999) (Lanham Act). To avoid
 conflict with patent law, Plaintiff would have to have pled that Defendants conduct was
 objectively and subjectively baseless, in that the patent was either “obviously invalid or plainly

1 not infringed,” and that the patentee knew or should have known that to be the case. *Globetrotter*
 2 *Software*, 362 F.3d at 1374–75.

3 Of course, Equadose’s statements that Hear Clearly’s infringement allegations were
 4 “wrongful and baseless” are legal conclusions and not entitled to any weight. Equadose’s
 5 allegation that Hear Clearly used “dishonest, unfair and improper means” is also an insufficient
 6 legal conclusion, reflecting merely “[t]hreadbare recitals of the elements of a cause of action”
 7 not entitled to any weight.

8 And, as noted above, the Complaint does not identify any element missing from its
 9 product, nor a specific date when its own product was introduced, beyond “Summer of 2018.”
 10 As Plaintiff itself cannot be specific as to the date of its own introduction of its product—
 11 evidence that it should have from its internal files—Plaintiff has failed to make a plausible
 12 showing that Defendants—who had no access to Plaintiff’s internal files—knew that date when
 13 Defendants filed for the ’191 patent on June 12, 2019, or when Hear Clearly later made its
 14 allegation of infringement to Amazon. For those reasons, Plaintiff has not pled sufficient facts
 15 to avoid the preemption due to, or conflict with, federal patent law.

16 **D. Count VI of the Complaint, for state law unfair competition, should also be**
 17 **dismissed as implausible under Washington law.**

18 Count VI alleges unfair competition under RCW 19.86.020 states “[u]nfair methods of
 19 competition and unfair or deceptive acts or practices in the conduct of any trade or commerce
 20 are hereby declared unlawful.”

21 Even if Count VI avoided preemption and this Court had jurisdiction over it, Count VI
 22 fails because Equadose has not adequately alleged a violation of RCW 19.68. RCW 19.68 states
 23 clearly: “Unfair methods of competition and unfair or deceptive acts or practices in the conduct
 24 of any trade or commerce are hereby declared unlawful.” The Complaint does not adequately
 25 plead any of these three varieties, instead stating only the bare conclusion that Hear Clearly

1 violated RCW 19.68.020 *et seq.*“ by engaging in an unfair or deceptive act, which was capable
2 of and did deceive the intended audience in Washington, in trade or commerce, directly
3 impacting the public interest in Washington.” Compl. ¶ 58. That does not suffice under
4 *Iqbal/Twombly*.

5 First, to prevail in a private CPA claim, the plaintiff must plead and prove (1) an unfair
6 or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest,
7 (4) injury to a person’s business or property, and (5) causation. *Hangman Ridge Stables, Inc. v.*
8 *Safeco Title Ins. Co.*, 105 Wash.2d 778, 784, 719 P.2d 531 (1986). Equadose does not identify
9 the “unfair or deceptive act or practice” that has occurred in trade or commerce, and thus its
10 conclusory assertion does not plausibly support an inference that Hear Clearly undertook any
11 conduct forbidden by law.

12 Moreover, Amazon is a private party, and under no obligation to allow Equadose to do
13 business on its site. Equadose has no “right” to sell on Amazon, and no “law” requires that
14 Amazon carry particular listings on its site.

15 The Complaint alleges only that Hear Clearly made allegations of patent infringement to
16 Amazon. Compl. ¶ 56. But “[s]ophisticated companies,” like Amazon, are not members of the
17 public for purposes of the “fraudulent” prong of RCW 19.86. *See Goodyear Tire*, 86 Wash.App.
18 at 745, 935 P.2d 628. In that case, Goodyear Tire sued an independent dealer for amounts due
19 on an open account. The dealer’s counterclaim alleged that Goodyear violated the Consumer
20 Protection Act by opening its own stores in the area and using unfair competitive tactics. First,
21 the court held that Goodyear had committed no unfair or deceptive acts. Second, there were few
22 indicators of public interest in what was basically a private dispute. Through his long business
23 relationship with Goodyear, the plaintiff had the experience necessary to judge the risks involved
24 in continuing that relationship. *Goodyear Tire*, 86 Wash.App. at 745, 935 P.2d 628. RCW 19.86,
25 which was modeled on the federal antitrust statutes, is meant “to complement the body of federal

1 law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts
 2 or practices in order to protect the public and foster fair and honest competition.” RCW
 3 19.86.920; accord *Blewett v. Abbott Labs.*, 86 Wash.App. 782, 786–87, 938 P.2d 842 (1997).

4 Here, Equadose’s unfair competition claim is based solely on Hear Clearly’s notice to
 5 Amazon. Equadose does not allege any facts showing harm to competition, instead relying only
 6 on alleged harm to Equadose, which is insufficient. In order to plead actual injury to competition,
 7 an antitrust claimant must generally present evidence delineating the “relevant market” and
 8 demonstrating the effects of the challenged conduct upon competition within that market. *Ballo*
 9 *v. James S. Black Co., Inc.*, 39 Wash.App. 21, 26, 692 P.2d 182 (1984). The “relevant market”
 10 includes both the geographic market, i.e., the area of effective competition within which buyers
 11 can turn for alternative sources of supply, and the product market, which includes product use,
 12 quality, and description. *Oltz v. St. Peter’s Comm’ty Hosp.*, 861 F.2d 1440 (9th Cir.1988). The
 13 relevant product market encompasses “all products that are ‘reasonably interchangeable,’ and so
 14 can be said to compete with each other for the same buyers’ dollars ...” *General Business Sys. v.*
 15 *North American Philips Corp.*, 699 F.2d 965, 972 (9th Cir.1983); *see also Thurman Indus., Inc.*
 16 *v. Pay ‘n Pak Stores, Inc.*, 875 F.2d 1369, 1373 (9th Cir.1989); *Oltz*, at 1446 (product market is
 17 “pool of goods or services” that qualify as economic substitutes because they “enjoy reasonable
 18 interchangeability of use and cross-elasticity of demand.”).

19 Equadose has failed to allege sufficient facts to show that: (a) Hear Clearly sufficiently
 20 interfered with Equadose’s business relationship with Amazon, (b) Equadose has acted for the
 21 sole purpose of harming the plaintiff or used dishonest, unfair, or improper means; and (c)
 22 Equadose’s business relationship with Amazon was damaged. Thus, Court VI should be
 23 dismissed for these reasons.

1 **E. Count VII, alleging a Lanham Act claim, should also be dismissed for failure to**
 2 **state a claim upon which relief can be granted because the claims do not concern**
 3 **“commercial advertising”.**

4 Count VII fails as a matter of law because the allegations do not support a Lanham Act
 5 claim. The Lanham Act, of course, is a trademark statute. But Count VII is devoid of any
 6 allegations of customer confusion required under the Lanham Act. *PS Promotions, Inc. v. Stern*,
 7 97 C 3742, 2000 WL 283092, at *12 (N.D. Ill. Mar. 8, 2000) (“The cornerstone of a Lanham Act
 8 claim is confusion.”); *Hart v. Amazon.com, Inc.*, 191 F. Supp. 3d 809, 820 (N.D. Ill. June 13,
 9 2016), *aff’d*, 845 F.3d 802 (7th Cir. 2017) (“because Plaintiff does not sufficiently allege that
 10 [Defendant’s] actions were likely to cause confusion among consumers, Plaintiff fails to state
 11 any cognizable claim under the Lanham Act.”) Instead, Equadose merely parrots the allegations
 12 of antitrust liability and allege Hear Clearly’s patent enforcement efforts are actionable as false
 13 advertising. This is incorrect as a matter of law.

14 Count VII relies on 15 U.S.C. § 1125(a), commonly known as § 43(a) of the Lanham
 15 Act, as the statutory basis for the claim. The Count specifically alleges Hear Clearly’s assertion
 16 of the ‘191 Patent was done in bad faith because “the ‘191 Patent is invalid” and enforcement of
 17 the ‘191 Patent was done with the specific intent to chill competition and increase revenues for
 18 Hear Clearly. The only alleged communications are those between Hear Clearly and Amazon
 19 and no advertising is alleged. Communication to Amazon is private commercial communication.
 20 Thus, the Complaint fails to establish the other claim found in 15 U.S.C. § 1125(a)—false
 21 advertising.

22 False advertising claims require, among other things “a false statement of fact by the
 23 defendant in a commercial advertisement about its own or another’s product.” *Hot Wax, Inc. v.*
 24 *Turtle Wax, Inc.*, 191 F.3d 813, 819 (7th Cir. 1999); see also 15 U.S.C. § 1125(a)(1)(B) (requiring
 25 such statements to be “in commercial advertising or promotion.”). “Advertising” is “the action
 of calling something to the attention of the public [especially] by paid announcements,” and

1 “promotion” is the “furtherance of the acceptance and sale of merchandise through advertising,
 2 publicity, or discounting.” *American Needle & Novelty, Inc. v. Drew Pearson Mktg., Inc.*, 820
 3 F.Supp. 1072, 1077 (N.D. Ill. April 26, 1993).

4 Hear Clearly’s patent enforcement was not a commercial advertisement. The Lanham
 5 Act does not recognize a claim for private statements made to a third party legal department in
 6 connection with the Amazon Program. These statements were not public facing, or
 7 advertisements, or anything that could cause customers to be confused as to the source of the
 8 goods sold by Hear or Hear Clearly. Put simply, the Lanham Act does not recognize a claim for
 9 what Equadose complains of.

10 **F. Particularly as the Counts should be dismissed, the Complaint fails to establish**
 11 **that the Court has, or should exercise, subject matter jurisdiction for each Count.**

12 The party seeking to invoke a federal court’s jurisdiction—here, Equadose—bears the
 13 burden of establishing jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377
 14 (1994). On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1),
 15 a court can “look beyond the complaint to matters of public record without having to convert the
 16 motion into one for summary judgment,” and need not presume the truth of the plaintiff’s
 17 allegations. *White v. Lee*, 227 F. 3d 1214, 1242 (9th Cir. 2000).

18 Under the Declaratory Judgment Act, a federal court “may declare the rights and other
 19 legal relations” between two parties. 28 U.S.C. § 2201(a). Where such a controversy exists, the
 20 Declaratory Judgment Act is “an enabling Act, which confers a discretion on the courts rather
 21 than an absolute right upon the litigant.” *Public Serv. Comm’n of Utah v. Wycoff Co.*, 344 U.S.
 22 237, 241 (1952). Whether to exercise jurisdiction in a given case “will depend upon a
 23 circumspect sense of its fitness informed by the teachings and experience concerning the
 24 functions and extent of federal judicial power.” *Id.* at 243.

1 The shotgun format of the Complaint alleges jurisdiction “pursuant to 28 U.S.C. §§ 1331
 2 (federal question), 1332 (diversity), and 1338 (action arising under an Act of Congress relating to
 3 patents, trademarks and unfair competition),” and states that the “action arises, among other things,
 4 under the patent laws of the United States, Title 35 of the United States Code (35 U.S.C. § 1, et seq.),
 5 Section 43 of the Lanham Act (15 U.S.C. § 1125), and under the Federal Declaratory Judgment Act
 6 (28 U.S.C. §§ 2201 and 2202),” and also relies on “supplemental jurisdiction pursuant to 28 U.S.C.
 7 § 1367.”

8 28 U.S.C. § 1331 states “[t]he district courts shall have original jurisdiction of all civil
 9 actions arising under the Constitution, laws, or treaties of the United States.” Plaintiffs fail to
 10 identify any section of the Constitution, any law or any treaty of the United States that its state
 11 law claim is brought under. The relevant section of 28 U.S.C. § 1338(a) states “The district courts
 12 shall have original jurisdiction of any civil action arising under any Act of Congress relating to
 13 patents, plant variety protection, copyrights and trademarks.” The state law Counts are not
 14 related to patents, plant variety protection, copyrights or trademarks. 28 U.S.C. § 2201 entitled
 15 “Creation of remedy” does not vest the district courts with subject matter jurisdiction over state
 16 law claims. 28 U.S.C. § 2202 entitled “Further relief” states “[f]urther necessary or proper relief
 17 based on declaratory judgment or decree may be granted, after reasonable notice and hearing,
 18 against any adverse party whose rights have been determined by such judgment.” 28 U.S.C.
 19 § 2202 does not vest the district courts with subject matter jurisdiction over state law claims.

20 Accordingly, Plaintiff’s theories for jurisdiction are not spelled out, particularly for each
 21 Count and for each Defendant within that Count. Moreover, as noted above, the federal law Counts
 22 should be dismissed, which should additionally serve to divest the Court of supplemental jurisdiction
 23 of the state law Counts. Under these circumstances, the Court should decline to exercise jurisdiction.

G. The Complaint should be dismissed as against Defendant Christopher Ackerman for failure to state a claim.

After alleging “alter ego” status (but alleging no facts to properly establish alter ego), Equadose simply refers to Digital Cashflow LLC and Christopher Ackerman collectively as “Defendants” or “Digital Cashflow.” Complaint, ¶ 7. Consequently, none of the Counts differentiate between Defendants. This approach particularly fails to state claims against Defendant Ackerman in his personal capacity, rather than in his capacity as carrying on the business of a closely-held company. Accordingly, Counts I-VIII should be dismissed against Defendant Ackerman.

Moreover, the Complaint does not allege sufficient facts to state a claim for relief from Defendant Christopher Ackerman individually that is plausible on its face because the Complaint does not allege facts sufficient to pierce the corporate veil to make him personally liable for the actions of Defendant Digital Cashflow, LLC, a New Jersey limited liability company.

“Under New Jersey law, a plaintiff must show the following to pierce the corporate veil: ‘(1) one corporation is organized and operated as to make it a mere instrumentality of another corporation, and (2) the dominant corporation is using the subservient corporation to perpetrate fraud, to accomplish injustice, or to circumvent the law.’ *Creditors Relief LLC v. United Debt Settlement LLC*, 2019 WL 7288978, at *4 (D.N.J., 2019) (citing *Bd. of Trustees of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 171 (3d Cir. 2002)). “The relevant factors in determining whether the first element is satisfied include (1) gross undercapitalization; (2) failure to observe corporate formalities; (3) non-payment of dividends; (4) the insolvency of the debtor corporation; (5) non-functioning of other officers or directors; (6) absence of corporate records; and (7) the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders. *Id.* (citing *Teamsters*, 296 F.3d at 172).

1 In *Wrist Worldwide Trading GMBH v. MV Auto Banner*, 2011 WL 5414307 (D.N.J.
 2 2011), the Court found that “Plaintiff recites the relevant *Teamster* factors but does not provide
 3 factual underpinnings to appropriately support its alter ego allegations” (*id.* at 2011 WL
 4 5414307, *5) and concluded that “Plaintiff’s parroting of the alter ego factors alone is
 5 insufficient to satisfy the required pleading standards. Plaintiff’s Proposed Alter Ego Allegation
 6 would not withstand a motion to dismiss” (*id.* at 2011 WL 5414307, *6).

7 Here, Equadose does not recite or address any of the *Teamsters* factors other than
 8 (arguably) “dominant stockholder” and merely makes threadbare allegations that “Ackerman ...
 9 exercises dominion and control over Digital Cashflow,” that “both Ackerman and Digital
 10 Cashflow share the same address ... in a residential neighborhood,” that “Ackerman’s home is
 11 the principal place of business for Defendant[] Digital Cashflow.” Complaint ¶ 7.

12 Because the Complaint does not provide factual underpinnings to appropriately support
 13 Equadose’s alter ego allegations, it should be dismissed as against Defendant Christopher
 14 Ackerman pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim against him
 15 individually.

16 V. CONCLUSION

17 For the foregoing reasons, Defendants respectfully request that the Court grant their
 18 Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction,
 19 Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, and to
 20 dismiss the claims against Defendant Christopher Ackerman pursuant to Fed. R. Civ. P. 12(b)(6)
 21 for failure to state a claim against him individually, and dismiss the Complaint in its entirety.
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 24
 25

1 DATED this 20th day of August, 2020.

2 s/ Mark Lawrence Lorbiecki

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19 *Christopher Ackerman*

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DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED. R.
CIV. P. 12(b)(1) AND 12(b)(6) - 20
(2:20-cv-01018-RAJ)

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send electronic notification of such filing to all CM/ECF participants.

DATED this 20th day of August, 2020.

s/ Mark Lawrence Lorbiecki
Mark Lawrence Lorbiecki, WSBA # 16796

DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED. R.
CIV. P. 12(b)(1) AND 12(b)(6) - 21
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